

KENNETH F. CUMMINGS

IBLA 79-336

Decided September 24, 1979

Appeal from decision of Nevada State Office, Bureau of Land Management, rejecting noncompetitive oil and gas lease offers for land within the National Desert Wildlife Range. N 20519, etc.

Affirmed.

1. Oil and Gas Leases: Generally -- Oil and Gas Leases: Lands Subject to -- Wildlife Refuges and Projects: Generally

Land within the National Desert Wildlife Range is not subject to noncompetitive oil and gas leasing.

APPEARANCES: C. M. Peterson, Esq., Poulson, Odell & Peterson, Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Kenneth F. Cummings appeals from the decision of the Nevada State Office, Bureau of Land Management (BLM), dated April 6, 1979, which rejected his noncompetitive offers to lease for oil and gas 1/ for the following reasons:

The lands in your offers lie within the boundaries of the National Desert Wildlife Range. According to the Department of the Interior Sacramento Regional Solicitor's Office in a memorandum dated March 22, 1979, the Range has been withdrawn for the specific purpose of the "protection, enhancement and maintenance of wildlife resources, including bighorn sheep."

"43 CFR 3101.3-3(a) . . . provides that lands withdrawn for the sole purpose of protecting all species of

1/ The offers to lease involved in this appeal are N 20519-N 20530, N 20684-N 20687, N 21067, N 21077, and N 21079.

wildlife in a particular area are wildlife refuge lands. . . ." Wildlife refuge lands are specifically exempt from oil and gas leasing under 43 CFR 3101.3-3(a) except when these lands are subject to drainage and in those instances, leases will be offered only under competitive bidding.

Appellant submits that the lands sought are within the National Desert Game Range and are available for noncompetitive oil and gas leasing under the specific provision of the National Wildlife Refuge Systems Act, particularly 16 U.S.C. § 668dd(c) and 668dd(d)(2) (1976). He argues that with the establishment of the National Wildlife Refuge System (System) in 1966, all areas for cultivation of fish and wildlife shall be administered by the Secretary of the Interior through the United States Fish and Wildlife Service (FWS), and that the mineral leasing laws shall continue to apply to any lands within the System to the same extent they applied prior to October 15, 1966, unless subsequently withdrawn under other authority of law. 16 U.S.C. § 668dd(c)(1976). Appellant stresses that other uses of System lands may be permitted where such uses are compatible with the major purposes for the establishment of a wildlife conservation area. 16 U.S.C. § 668dd(d)(2)(1976).

Appellant contends the Congressional standard of determination of compatibility was not followed by BLM as to his offers. He suggests that the principle of multiple use set out in the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701(a)(7) and 1702(c)(1976), is applicable to wildlife lands and the standard for determination of permitted multiple uses is compatibility. He does not dispute that the sole jurisdiction over the lands may now reside with FWS but suggests that Public Land Order No. (PLO) 4079, 31 FR 11547 (September 1, 1966), which withdrew the lands for the Desert National Wildlife Range specifically allowed for leasing of the lands for oil and gas and stated that oil and gas leasing had been permitted under the preexisting Desert Game Range, EO 7373, May 20, 1936, PLO 156, August 4, 1943, both of which orders were revoked by PLO 4079.

Appellant further contends that if denial of oil and gas leasing of the Desert Game Range lands had occurred, it was based on the exercise of Secretarial discretion, but under existing law today the Secretary must consider both multiple use and compatibility in the exercise of his discretionary authority. He submits that wildlife values of Desert National Wildlife Range should be protected, but contends special stipulations would permit oil and gas leasing on the reserve and at the same time protect the wildlife resource.

The regulations governing the administration of the National Wildlife Refuge System are found in 50 CFR Subchapter C, Parts 25-35. A revision of the public use regulations affecting System lands was

promulgated at 41 FR 9166, March 3, 1976. 2/ Included in the revised regulations are the definitions set out in 50 CFR 25.12(a), 3/ including:

"National Wildlife Refuge System" means all lands, waters, and interests therein administered by the U.S. Fish and Wildlife Service as wildlife refuges, wildlife ranges, wildlife management areas, waterfowl production areas, and other areas for the protection and conservation of fish and wildlife including those that are threatened with extinction.

"National wildlife refuge" means any area of the National Wildlife Refuge System except wildlife management areas.

Mineral operations on wildlife refuge areas are governed by 50 CFR 29.31, which provides:

Where mineral rights to lands in wildlife refuge areas are vested in the United States, the provisions of 43 CFR 3103.2 and 3120.3-3 govern. 4/

43 CFR 3101.3-1 (formerly 3120.3-3) provides that land in wildlife refuges may be leased competitively for oil and gas only if the U.S. Geological Survey has determined the lands are subject to drainage. 43 CFR 3109.4-2 (formerly 3103.2) provides that game range lands may be leased subject to special stipulations deemed necessary to protect the withdrawn land. Thus, at first blush, it would appear that game range lands may be leased for oil and gas, but the current

2/ This rulemaking was proposed at 40 FR 12270, March 18, 1975, with an invitation to the interested public to participate in the rulemaking process.

3/ Prior to the revision of March 3, 1976, 50 CFR 25.1 had these definitions:

"Game range" means any area of public land administered jointly by the Bureau of Sport Fisheries and Wildlife and the Bureau of Land Management for the protection and management of wildlife resources and for the grazing of domestic livestock under the terms of an Executive or Public Land Order establishing a specific area.

"National wildlife refuge" means any of those areas, except game ranges, owned or controlled by the United States and administered for the benefit of wildlife by the Bureau of Sport Fisheries and Wildlife as a part of the National Wildlife Refuge System."

The 1976 revision revoked these definitions.

4/ The sections of 43 CFR referred to in 50 CFR 29.31 have been redesignated as 3109.4-2 and 3101.3-1, respectively.

definition of a National Wildlife Refuge, 50 CFR 25.12, includes all areas of the System except wildlife management areas. It therefore follows that the Desert National Wildlife Range is, by definition, a "National Wildlife Refuge" and so may not be leased noncompetitively for oil and gas.

In T. R. Young, Jr., 20 IBLA 333 (1975), this Board held:

Under section 17 of the Mineral Leasing Act of 1920, as amended, the Secretary of the Interior has discretion to refuse to issue an oil and gas lease in the interest of conservation, wildlife protection, and other purposes in the public interest.

The general prohibition against oil and gas leasing in wildlife refuges contained in 43 CFR 3101.3-3 (unless there is drainage) is a formal exercise of the Secretary's discretion under section 17 of the Mineral Leasing Act of 1920, as amended.

The Secretary's authority to withdraw public lands is separate from, and in addition to, the Secretary's discretionary authority under section 17 of the Mineral Leasing Act of 1920, as amended. Therefore, public lands which are described in a public land order as not withdrawn from leasing under the mineral leasing laws remain subject to an exercise of the Secretary's discretion under section 17 of the Mineral Leasing Act of 1920, as amended.

Young arose in connection with oil and gas lease offers for lands withdrawn as waterfowl production areas, which FWS had advised BLM were part of the National Wildlife Refuge System, and that any oil and gas leasing of the area would be incompatible with the primary purposes of acquiring waterfowl habitat.

[1] Although the record before us does not indicate that FWS has been requested to comment on the possible compatibility of oil and gas leasing and management of the National Desert Wildlife Range, that omission is not of any consequence under the plain language of 50 CFR 25.12 and 43 CFR 3101.3-3(a). Accordingly, the rejection of the subject oil and gas lease offers must be affirmed.

This Board is not the proper forum to consider appellant's argument that the pertinent regulations are invalid under the National Wildlife Refuge System Act, 16 U.S.C. § 668dd (1976). Such argument should be addressed to the Secretary of the Interior. It should be noted, however, that the Secretary is not authorized by law to effectuate the policies of the Mineral Leasing Acts so single-mindedly that

he is thereby equally required to ignore the objective of the wildlife conservation laws. Solicitor's Opinion, M-36519, 65 I.D. 305 (1958).

We point out that there is an apparent conflict between 50 CFR 25.12 and 50 CFR 29.31, as to the leasability of game range lands for oil and gas. Also, we note that 43 CFR 3101.3-3(b), as it relates to leasing of game ranges and Alaska wildlife areas, appears to be inconsistent with 50 CFR 25.12. Clarification of these apparent differences by amendment of the regulations would be helpful.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Frederick Fishman
Administrative Judge

